d. Prejudice

Barker proposes that prejudice "[s]hould be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." Id. at 532. This Court further identified those interests as: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Id.

The Court of Appeals focused on the third interest and found that changes in witnesses' testimony over three, and presumably a fourth, trial were not prejudicial and, therefore, there was no prejudice. Furthermore, the Court of Appeals' finding that "Mr. Batie does not argue that he suffered any unusual anxiety from the delay," is not supported by the record. Batie at 1292. In Petitioner's Memorandum in support of his Motion to Dismiss, Petitioner states that "[h]is incarceration has caused him severe financial and emotional burdens. Additionally, as a result of this unjustifiably lengthy incarceration, Defendant has been unable to fully participate

in his own defense, or to contribute financially or emotionally to the well-being of himself and his family." (Appendix p. 46).

The Court of Appeals' finding that Petitioner was not prejudiced by the seventeen and one-half month delay is not consistent with prior decisions by this Court or the factual findings of the district court. Doggett v. United States, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992), stands for the proposition that the longer the delay the more likely that "[e]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." The district court's findings in its Order dismissing the Indictment against Petitioner contains similar language to Doggett:

> The Court has been in a unique position to view the government's evidence throughout the course of repeated pretrial detention hearings, hearings on motions in limine, and during the course of three trials, one of which was completed. . . *In the Court's opinion, it would be highly prejudicial to Defendant to force*

> *him to continue to put his life on hold until another trial is scheduled and conducted,* particularly when the likelihood that the outcome would be different is so low.

(Appendix p. 39-40)(emphasis added).

The Court of Appeals' greatest oversight was failing to consider the effect a fourth trial would have on Petitioner's right to a speedy trial. The Court of Appeals' limited its analysis on prejudice through the first three trials and did not consider prejudice to the defendant for a fourth round of witness testimony, delay, anxiety to the Petitioner, and the impossibility of Petitioner moving on with his life.

In Carsey v. United States, 129 U.S. App. D.C. 205, 208-09 (1967), the judge described how, over successive prosecutions, the State's witnesses' testimony subtly changed: "[t]he Government witnesses came to drop from their testimony impressions favorable to defendant. Thus a key prosecution witness, the last person to see appellant and the deceased together, who began by testifying that

they had acted that evening like newlyweds, ended up saying that the words between them had been 'firm,' and possibly harsh and 'cross.'" The same concern that existed in Carsey exists in the present case, that over time memories are not as sharp and the stories naturally change to incorporate new impressions learned in trial and in trial preparation. Moreover, frustration causes persons to act in ways they perceive will meet their desired ends. Therefore, a key witness' testimony may twist, consciously or unconsciously, in hope that the small change will effect the outcome. In the present case, during the first trial, the witness, Mr. Sorenson, stated that when a police officer presented him with a photo lineup, the picture of the Petitioner looked more like the robber than any of the other five pictures. By the last trial, Mr. Sorenson was much more firm in his identification of the Petitioner. The witnesses's changed testimony is just one example of how testimony became more prejudicial towards Petitioner with each trial. This kind of change can be critical in a circumstantial evidence case.

Petitioner submits that the district court's findings that "[t]he Barker factors weigh in favor of granting Defendant's Motion to Dismiss the Indictment," and that the "[f]actors add up to a violation of Defendant's right to a speedy trial under the Sixth Amendment," is the appropriate decision and, therefore, certiorari should be granted, to reverse the Circuit Court.

POINT III: DUE PROCESS

The Court of Appeals' finding that "We disagree with the district court that government action producing delay in trial could "shock the conscience" without even rising to the level of affirmative misconduct," fails to give adequate deference to the district court's factual findings and is inconsistent with decisions from other courts.

The Tenth Circuit cited United States v. Kearns, 5 F.3d 1251, 1253 (9th Cir. 1993) to support its finding that nothing short of gross misconduct on the part of the government warrants a dismissal of an indictment. Kearns does not address the issue of multiple retrials. In contrast, two district court decisions, dealing directly with the issue of multiple retrials support a finding that "[t]he court, in its

discretion, may dismiss the indictment with prejudice if it determines that a retrial is against the concept of fundamental fairness." United States v. Rossoff, 806 F. Supp. 200, 202 (C.D. Ill. 1992) (See also United States v. Ingram, 412 F. Supp. 384, 385 (D.D.C. 1976)(stating "[o]nce again the ever recurring problem is presented whether any discretion exists in a United States District Judge to terminate a useless prosecution. This is of course, not a case of double jeopardy. It is simply a matter of fair play. The Government has no new proof; it simply wants another chance.").

The district court's assessment that "[r]equiring Defendant to face a fourth trial when the government's prospects of a conviction are so sparse would violate Defendant's right to due process under the Fifth Amendment," is consistent with the Fifth Amendment and the decisions of courts addressing the issue of whether multiple trials, under the circumstances, "'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" (Appendix p. 41 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

The Tenth Circuit's consideration of the due process issue fails to consider that Petitioner is prosecuted by the government as a whole - - including police, prosecutors, pre-trial detention officers, and the courts. The totality of circumstances created by all the components of "the government" may operate to deprive a petitioner of due process. The Tenth Circuit's insistence on a finding of affirmative misconduct by the prosecution as a precondition to the dismissal of an indictment for a due process violation is a misreading of the due process guarantee. That is what occurred here.

The Tenth Circuit's review of the record and analysis of Petitioner's due process rights is contrary to the Constitution and decisions from other courts. It is therefore, appropriate, for this Court to grant Certiorari to determine whether or not Petitioner's Constitutional right to Due Process would be violated, under the circumstances, to face a fourth trial, irrespective of the speedy trial issues.

CONCLUSION

This Court should grant certiorari to hear these issues regarding the Fifth and Sixth Amendments.

RESPECTFULLY SUBMITTED this 16 day of May, 2006.

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APPENDIX

LEXSEE 433 F3D 1287

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. MICHAEL CHARLES BATIE, Defendant-Appellee.

No. 04-4299

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

433 F.3d 1287; 2006 U.S. App. LEXIS 66

January 4, 2006, Filed

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH. (D.C. NO. 2:03-CR-351 TS).

DISPOSITION: REVERSED, REMANDED.

COUNSEL: Elizabethanne C. Stevens, Assistant United States Attorney (Paul M. Warner, United States Attorney and Barbara Bearnson, Assistant United States Attorney with her on the brief), Salt Lake City, Utah, for Plaintiff-Appellant.

Mary C. Corporon, of Corporon, Williams & Bradford, P.C., Salt Lake City, Utah, for Defendant-Appellee.

JUDGES: Before McCONNELL, McKAY, and TYMKOVICH, Circuit Judges.

OPINIONBY: [*1289] McCONNELL

OPINION: McCONNELL, Circuit Judge.

Michael Charles Batie was indicted on May 15, 2003 for armed bank robbery and for brandishing a firearm while committing a crime of violence. After seventeen months and three mistrials the district court granted Mr. Batie's motion to dismiss the indictment with prejudice for violations of his constitutional rights to a speedy trial and due process. The government appeals and we **REVERSE**.

I.

Mr. Batie was indicted on May 15, 2003 for an armed robbery that took place on March 27, 2003. Witnesses at the scene gave police a partial description of the disguised robber and a partial license plate number for his [**2] black Jeep Cherokee; this information led police to Mr. Batie, who was ultimately indicted. The magistrate ordered Mr. Batie detained pending trial because he was on federal supervised release when the robbery took place. Trial was set for July 30, 2003, but the trial date was continued on Mr. Batie's motion. The first trial began December 9, 2003. It ended in a mistrial on December 11, 2003, when a government witness testified that he had first met Mr. Batie in federal prison. n1

n1 The prosecutor's question was not obviously designed to elicit information regarding Mr. Batie's prior criminal history:

> Q. How did you come to know [Mr. Batie]?
>
> A. I met him in Colorado with my then girlfriend's family at the federal penitentiary where he--
>
> [Objection by defense counsel]

Appellant App. Vol. I 164. The prosecutor indicated that she anticipated an answer about the witness's interactions with the defendant in Utah, not in prison in Colorado. *Id.* at

166.

[*1290] The court set the next trial date for [**3] March 1, 2004, but the trial was continued on the parties' joint motion until May 11. On March 4, 2004, Mr. Batie moved to dismiss the indictment against him on the basis of double jeopardy; this motion was denied on April 21. The trial moved forward on its appointed date, only to end in a mistrial on May 12 when a juror saw Mr. Batie walking through a hallway in handcuffs. On May 17, Mr. Batie again moved for a dismissal of the indictment, this time claiming violations of his constitutional rights under speedy trial, due process, and double jeopardy provisions.

II.

The Sixth Amendment to the United States Constitution guarantees the right of criminal defendants to a "speedy and public trial." U.S. Const. amend. VI. The district court held that the seventeen and one-half month delay that had passed since Mr. Batie's indictment and "the accompanying tortuous procedural history" violated this right. We review de novo the district court's dismissal of the indictment based on a constitutional violation of the speedy trial right. In determining whether a delay violates a defendant's right to a speedy trial, the Supreme Court has instructed us to balance 1) the length of the delay, [**4] 2) the reason for the delay, 3) the defendant's assertion of--or failure to assert--his right, and 4) any prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). None of these four factors is, by itself, "a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id.* at 533. Instead, we consider these factors together with any other relevant circumstances. *Id.*

A. *Length of Delay*

The first factor, length of delay, functions as a gatekeeper. We examine these other factors only if a delay is long enough to be presumptively prejudicial. *Id.*

at 530; *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). Delays approaching one year generally satisfy the requirement of presumptive prejudice. *Doggett*, 505 U.S. at 652 n.1; *Jackson v. Ray*, 390 F.3d 1254, 1261 (10th Cir. 2004). The length of delay is measured from the time at which the speedy trial right attaches: the earlier of either arrest or indictment. *United States v. Marion*, 404 U.S. 307, 320-21, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); [**5] *Jackson*, 390 F.3d at 1261. Mr. Batie was indicted on May 15, 2003, seventeen and one-half months before the district court dismissed the indictment. This delay, exceeding one year, was presumptively prejudicial.

Once a defendant establishes presumptive prejudice, we must examine "the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim," as well as the remaining factors. *Doggett*, 505 U.S. at 651-652. This inquiry is relevant because the length of delay depends on "the peculiar circumstances of the case," *Barker*, 407 U.S. at 530-31, and "the presumption that pretrial delay has prejudiced the accused intensifies over time," *Doggett*, 505 U.S. at 652. Thus, less delay is tolerated for ordinary street crimes, and more delay for complex conspiracy charges. *Barker*, 407 U.S. at 531. The government should not have needed over seventeen months to prepare a case against Mr. Batie for armed bank robbery and brandishing a firearm. *Cf. United States v. Santiago-Becerril*, 130 F.3d 11, 22 (1st Cir. 1997) (fifteen month delay in prosecuting [**6] case for the wrongful taking of a motor vehicle with force resulting in death and for knowing use of a firearm in relation to a crime of violence [*1291] was arguably sufficient to "tip the scales slightly in favor" of the defendant's speedy trial claim). Accordingly, the length of delay weighs in Mr. Batie's favor.

B. *Reasons for the Delay*

The reason for a delay weighs

against the government in proportion to the degree to which the government caused the delay. A deliberate attempt to delay a trial in order to secure a strategic advantage will weigh heavily against the government, while valid reasons will justify a delay. *Barker*, 407 U.S. at 531. Between these two poles lie many reasons for delays for which the government bears responsibility, even when the government did not intend the delays. Negligence and crowded court dockets, for example, weigh against the government, but less heavily than delays deliberately sought to gain improper advantage. *See id.* In contrast, continuances and other motions filed by the defendant do not weigh against the government. *See United States v. Tranakos*, 911 F.2d 1422, 1428 (10th Cir. 1990).

Roughly eight [**7] months, or nearly half, of the delay of which Mr. Batie complains was consumed by defendant's motions for continuances (one of which was joint) and dismissal, and this period weighs against the government not at all. The government argues that four months' delay was caused by Mr. Batie's motions for mistrials and seems to blame him for the delay. However, this time must weigh against the government, although less heavily than deliberate misconduct. *See Barker*, 407 U.S. at 531. Another month passed, over the government's objection, while the court considered Mr. Batie's final motion to dismiss. This delay also must weigh, however lightly, against the government. The district court found that there had been no government wrongdoing and that "the parties and the Court [had] diligently attempted to reach a jury verdict." Nonetheless, the delays attributable to the government must be considered, even when they do not weigh heavily against the government. *See United States v. Gomez*, 67 F.3d 1515, 1522 (10th Cir. 1995) (delay resulting from two continuances requested by the government and consented to by the defendant and from one continuance ordered sua [**8] sponte by the court weighed lightly against the

government where there was no evidence of government misconduct).

C. *Assertion of the Speedy Trial Right*

Perhaps most important is whether the defendant has actively asserted his right to a speedy trial. This is not satisfied merely by moving to dismiss after the delay has already occurred. Such a motion could be, indeed may well be, strategic. The question, instead, is whether the defendant's behavior during the course of litigation evinces a desire to go to trial with dispatch. *See Barker*, 407 U.S. at 536 ("Barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial."); *United States v. Dirden*, 38 F.3d 1131, 1138 (10th Cir. 1994) (finding that the third factor weighed against a defendant who moved for a continuance and acquiesced when the trial date was vacated twice); *Tranakos*, 911 F.2d at 1429 ("We are unimpressed by a defendant who moves for dismissal on speedy trial grounds when his other conduct indicates [**9] a contrary desire."). Mr. Batie had moved for and received two continuances, one of which was jointly sought, before his first motion to dismiss on speedy trial grounds. Even after moving (for the first time) to dismiss the indictment for a violation of his right to a speedy trial, Mr. Batie moved a [*1292] third time to continue the trial. This motion was granted *over the government's objection*. Mr. Batie's persistent requests for continuances, even when opposed, scarcely demonstrate a desire for a speedier process. n2 Thus, this factor weighs against Mr. Batie.

n2 At oral argument, Mr. Batie's counsel stated that the third (opposed) continuance had been requested to ensure the availability of an expert witness and suggested that a

defendant should not be forced to choose between two constitutional rights. There is nothing to suggest that Mr. Batie was placed in this unenviable position. Absent evidence that this expert's qualifications were unique, criminal defendants do not enjoy the right to a particular expert witness, and a defendant anticipating a speedy trial motion would be well advised to make sure his own case is ready to proceed.

[**10]

D. *Prejudice*

We assess prejudice in light of the particular evils the speedy trial right is intended to avert: "pretrial incarceration; . . . anxiety and concern of the accused; and . . . the possibility that the defense will be impaired." *United States v. Kalady*, 941 F.2d 1090, 1095 (10th Cir. 1991) (citing *Barker*, 407 U.S. at 532). The most serious of these is impairment of the defense "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker*, 407 U.S. at 532. Mr. Batie does not argue that he suffered any unusual anxiety from the delay, and he was released from pre-trial detention following the third mistrial. Mr. Batie finds prejudice in the fact of three mistrials and the effect those mistrials have had on the memories of government witnesses. Ordinarily, the failure of a government witness's memory benefits, rather than prejudices, a defendant's case. *See Barker*, 407 U.S. at 521; *Tranakos*, 911 F.2d at 1429. But Mr. Batie contends that testifying repeatedly has permitted government witnesses to "become educated about the case, [**11] and frustrated." Mr. Batie cites numerous examples of subtle shifts in the testimony of government witnesses over the course of three trials. These appear relatively minor. Moreover, even if these changes are as significant as Mr. Batie suggests, there is no reason to

believe they could not be effectively exposed during cross-examination, and thus used to the advantage of the defense. n3

> n3 Mr. Batie's counsel suggested that he would be prejudiced by references to earlier trials. It is not clear why prejudice would result from the jury's knowledge that the government had already tried and failed to secure a conviction. Indeed, the jury's awareness that another jury had failed to reach a verdict could work to Mr. Batie's advantage.

Mr. Batie also argues that it was not merely the content of witness testimony that changed, but the manner in which testimony was given. If a witness delivers his testimony with greater assurance and specificity with each re-telling, the government's case could indeed be improved [**12] by successive mistrials. An analysis of such alterations must be made in the first instance, however, by a court with an opportunity to observe the witnesses as they progress through the trials. It is incumbent upon counsel anticipating such an argument on appeal to urge the argument first in the trial court in order to develop a record suitable for review. The district court here made no rulings regarding any changes, whether of substance or manner, in the testimony of government witnesses. There is accordingly nothing in the record that would permit us to reach the result for which Mr. Batie asks.

Taken together, the *Barker* factors do not warrant dismissal. Commencing three trials in just over a year suggests reasonable alacrity rather than deplorable delay. [*1293] Absent extraordinary circumstances, *Barker* counsels us not to find a violation of the right to a speedy trial when the defendant's actions indicate he had no desire for a speedy trial. The absence of prejudice also cuts against finding a violation of the right. Dismissing an indictment is a drastic remedy, and an unsuitable one where delay has endangered

none of the interests the speedy trial right is intended to protect--not [**13] even the desire for a speedy trial.

III.

In addition to a speedy trial violation, the court found that a fourth trial would be a violation of Mr. Batie's substantive due process rights. We review the district court's dismissal on that ground de novo. *United States v. Thody*, 978 F.2d 625, 628 (10th Cir. 1992). Substantive due process "prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (internal quotation marks and citations omitted). The district court found no government misconduct, but held that misconduct was not required for dismissing an indictment on due process grounds: "The standard is simply that some government action deprives a defendant of his right to due process under the Fifth Amendment to a degree that shocks the conscience." Appellant App. Vol. I 158 (internal quotation marks omitted).

We disagree with the district court that government action producing delay in trial could "shock the conscience" without even rising to the level of affirmative misconduct. Certainly [**14] this is not such a case. In the context of pre-indictment delay, this Court has held that, to warrant dismissal, a defendant must demonstrate the government's delay was intentional and purposeful: "more than ordinary negligence on the part of Government representatives must be shown, no matter how high the actual proof of prejudice is." *United States v. Comosona*, 614 F.2d 695, 696 n.1 (10th Cir. 1980). One circuit has confronted the question of post-indictment delay, and has concluded that a dismissal on substantive due process grounds requires both prosecutorial misconduct and substantial prejudice. *United*

States v. Kearns, 5 F.3d 1251, 1253 (9th Cir. 1993) (finding that the shocks-the-conscience standard was not met where delay was caused by incompetence rather than intentional deception). Indeed, the Ninth Circuit held that the remedy of dismissal requires not only misconduct, but egregious misconduct. "To warrant dismissal on due process grounds, government conduct must be so grossly shocking and outrageous as to violate the universal sense of justice." *Id.*.

The due process violation on which the district court relied in this case had nothing [**15] to do with government misconduct, but instead related to the perceived weakness of the government's case. The district court stated that it "would be inconsistent with the 'concept of ordered liberty' . . . and would arguably 'shock the conscience'" to try Mr. Batie a fourth time "when the government's prospects of a conviction are so sparse." Appellant App. Vol. I 158-59. However, determining whether to prosecute is a decision ordinarily entrusted to prosecutorial, rather than judicial discretion. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion."); *United States v. Lai Ming Tanu*, 589 F.2d 82, 90 (2d Cir. 1978) (finding that retrial after two [*1294] trials ended with deadlocked juries did not violate due process and acknowledging that the district court could not infringe on the duties and prerogatives of the prosecutor by dismissing the case). In the event that an overzealous prosecutor brings a case with insufficient [**16] evidence to support it, the rules of criminal procedure provide the district court with a mechanism to prevent the case from being submitted to a jury. *See* Fed. R. Crim. P. 29(a). Any prejudice resulting from the prosecution of a case with insufficient evidence to support

the charges could therefore be mitigated by filing a Rule 29(a) motion at the appropriate time. Because either defense counsel did not file such a motion, or the district court denied it, n4 we must infer that there was sufficient evidence to support the charges against Mr. Batie and that he will not be prejudiced by retrial. Accordingly, subjecting Mr. Batie to a fourth trial is not inconsistent with the "concept of ordered liberty" and does not "shock the conscience."

n4 The appellate record is ambiguous as to whether defense counsel filed a Rule 29 motion during the third trial. The trial transcript indicates that the district court scheduled a hearing on the Rule 29 motion, but the record does not include a transcript of such a hearing or documents filed in support of that motion.

[**17]

CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's decision dismissing the indictment and **REMAND** this case to the district court for a new trial on the charges contained in the May 15, 2003 indictment.

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL CHARLES BATIE, Defendant.	ORDER GRANTING DEFENDANT'S MOTION TO DISMISS INDICTMENT Case No. 2:03-CR-351 TS

This matter is before the Court on Defendant's Motion to Dismiss the Indictment. Defendant alleges that dismissal is warranted based upon five different grounds: 1) Fifth Amendment

protection against double jeopardy; 2) Sixth Amendment right to a speedy trial;[1] 3) Fifth Amendment right to "fundamental fairness" and due process; 4) Eighth Amendment protection against cruel and unusual punishment; and 5) totality of circumstances (combination of above factors).

At the close of briefing, the Court held a hearing on the instant Motion on November 4, 2004. Arguments of counsel were heard, and the Court took the matter under advisement.

BACKGROUND

On May 15, 2003, Defendant was charged in a two-count Indictment for Bank Robbery and Brandishing a Firearm During a Crime of Violence. The Court has commenced trial in this case on

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[1] Defendant does not allege a violation of the Speedy Trial Act but, rather, brings this claim under the Sixth Amendment.

three separate occasions, all ending in mistrials. A mistrial was declared in the first two trials before the completion of the trial; the third trial ended in mistrial due to a "hopelessly deadlocked" jury.

Defendant was detained in the custody of the U.S. Marshall from the time of his arrest until he was released with conditions by Chief Magistrate Judge Alba on September 23, 2004, following the mistrial in the third trial – some 16 months. The government objected to Defendant's pretrial release, but this Court affirmed the Magistrate on October 7, 2004.

DISCUSSION

I. DOUBLE JEOPARDY UNDER THE FIFTH AMENDMENT

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . ." However, the Tenth

Circuit has held that "[t]he general rule is that the Double Jeopardy Clause does not bar retrial where a defendant moves successfully for a mistrial. A narrow exception exists where 'the conduct giving rise to the successful motion for a mistrial was *intended to provoke the defendant into moving for a mistrial.*'" United States v. Gonzalez, 248 F.3d 1201, 1203 (10th Cir. 2001)(emphasis in original)(citing Oregon v. Kennedy, 456 U.S. 667, 679 (1982)).

The Court has previously ruled that the mistrials declared at the request of Defendant in the first two trials were due to mistake and inadvertence. There was no intent on the part of the government to provoke a mistrial. Therefore, the "narrow exception" to the general rule does not apply to the first two mistrials.

The third trial ended in a classic hung jury. The Supreme Court has held that a hung jury is not the equivalent of an acquittal

which would terminate jeopardy: "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which [defendant] was subjected . . . . [J]eopardy does not terminate when the jury is discharged because it is unable to agree." United States v. Richardson, 468 U.S. 317, 325-26 (1984).

Given the totality of the circumstances surrounding each mistrial in this case, the Court finds that Defendant's right to protection against double jeopardy under the Fifth Amendment was not violated by the declarations of mistrial, because Defendant has not yet been subjected to original jeopardy.

II. RIGHT TO SPEEDY TRIAL UNDER THE SIXTH AMENDMENT

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy

the right to a speedy and public trial . . ." The Supreme Court, in Barker v. Wingo, 407 U.S. 514 (1972), set forth a four-part test for the Court to consider in determining speedy trial claims under the Sixth Amendment: 1) the length of the delay, 2) the reason for the delay, 3) the defendant's assertion of his right to a speedy trial, and 4) prejudice to the defendant.

First the Court turns to both the length of dely and the reasons for delay. The Indictment in this case was filed on May 15, 2003, some 17 ½ months ago. The parties and the Court have diligently attempted to reach a jury verdict in this case, but have been unable to do so. The Court wishes to make it clear that it finds no wrong-doing by any party. However, the delay and the accompanying tortured procedural history in this case have reached the point where relief is warranted, despite the parties' intentions.

Next, the Court considers Defendant's assertion of his right to a speedy trial. After the second mistrial, Defendant asserted his right to speedy trial, which was denied by this Court. However, the procedural posture and circumstances of this case wince then have altered that analysis.

Finally, the Court will consider the prejudice to Defendant. The entire case–prosecution, defense, and rebuttal–has now been fully put before a jury, which was unable to reach a verdict and ended up hopelessly deadlocked. As the Court has previously noted, the evidence against Defendant is totally circumstantial in nature. The Court has been in a unique position to view the government's evidence throughout the course of repeated pretrial detention hearings, hearings on motions in limine, and during the course of three trials, one of which was completed. There is unrebutted evidence that the majority of the jurors that considered

the case were in favor of acquittal. The Court is not confident that any other jury could, or would, reach any different conclusion. In the Court's opinion, it would be highly prejudicial to Defendant to force him to continue to put his life on hold until another trial is scheduled and conducted, particularly when the likelihood that the outcome would be different is so low.

Based upon this analysis, the Court finds that the Barker factors weigh in favor of granting Defendant's Motion to Dismiss the Indictment. These factors add up to a violation of Defendant's right to a speedy trial under the Sixth Amendment.

III. DUE PROCESS UNDER THE FIFTH AMENDMENT

In addition, the Court concludes that this case must be dismissed under the Fifth Amendment. The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law . .

." The Supreme Court has held that "so-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" United States v. Salerno, 481 U.S. 739, 745 (1987) (internal citations omitted).

The Court does not agree with the government's argument that the action on the part of
the government that is required to violate a defendant's substantive due process must result from
some sort of bad faith or malicious intention. The standard is simply that some government
action deprives a defendant of his right to due process under the Fifth Amendment to a degree
that "shocks the conscience"or "interferes with rights 'implicit in the concept of ordered

liberty.'" Id.

The Court finds that requiring Defendant to face a fourth trial when the government's prospects of a conviction are so sparse would violate Defendant's right to due process under the Fifth Amendment. The Court believes that taking such a course, given the procedural history of this case, would be inconsistent with the "concept of ordered liberty" as understood and accepted in our society, and would arguably "shock the conscience." There comes a point where the Court must determine whether a line has been crossed that violates Defendant's due process rights, and the Court finds that that line has indeed been breached in this case.

Having decided that Defendant's Motion has merit on the preceding two grounds, the Court need not address Defendant's remaining grounds.

CONCLUSION

Based upon the above, it is therefore

ORDERED that Defendant's Motion to Dismiss the Indictment is GRANTED based upon a violation of Defendant's Sixth Amendment right to a speedy trial, and for violation of Defendant's Fifth Amendment right to due process. The Motion is DENIED on the remaining grounds. It is further

ORDERED that the Indictment against Defendant in this case be DISMISSED, with prejudice, and that this case be closed forthwith.

SO ORDERED.

DATED this _____ day of November, 2004.

BY THE COURT:

/s/ _____

TED STEWART
United States District Judge

obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const., Amend. VI.

In determining whether the right to a speedy trial under the Sixth Amendment has been violated, this court should weigh four factors: the "(l)ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Burkett v. Cunningham*, 826 F.2d 1208, 1219 (3rd Cir. 1987) (quoting *Barker v. Wingo*, 407 U.S. 514, 530, S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972); *Sandler v. Sullivan*, 748 F.2d 820 (3d Cir. 1984). The United States Supreme Court has held that, because the right to a speedy trial is vague, courts must approach such cases on an ad hoc basis. *Barker*, 407 U.S. at 521, 530, 92 S.Ct. At 2187, 2192. The four factors "are guidelines, not rigid tests." *Perez v.*

Sullivan, 793 F.2d 249, 254 (10th Cir. 1986). Further, "no single factor is "either a necessary or sufficient condition of the deprivation of a right to a speedy trial." *Burkett*, 1t 1219, quoting *Barker*, 407 U.S. at 533, 92 S.Ct. at 2193.

Each of the four factors outlined above have been met in this case. Defendant has now been incarcerated for over eighteen months while awaiting a final resolution. His incarceration has caused him severe financial and emotional burdens. Additionally, as a result of this unjustifiably lengthy incarceration, Defendant has been unable to fully participate in his own defense, or to contribute financially or emotionally to the well-being of himself and his family. The delay is the result of repeated mistrials for which Defendant has no responsibility. Defendant has not been the cause of any delay during any of the three trials he has been subjected to.

The last jury was prepared to acquit Defendant by a margin of 9-3, and was certainly unable to convict Defendant beyond a reasonable doubt.

Significantly, if the four-factor analysis outlined above "leads to a conclusion that the right to a speedy trial has been violated, the prejudice of the violation must be rectified." *Burkett*, at 1220. See, e.g., *Braden v. Kentucky*, 410 U.S. 484, 486, 93 S.Ct. 1123, 1125, 35 L.Ed.2d 443 (1973). Moreover, "where the prejudice cannot be rectified, the remedy must be discharge from custody with prejudice to retrial." *Id.* See, e.g., *Strunk v. United States*, 412 U.S. 434, 440, 93 S.Ct. 2260, 2263-64, 37 L.Ed.2d 56 (1973).

Accordingly, the circumstances surrounding the delays in this case now require dismissal of Defendant's indictment with prejudice.

3. THE INDICTMENT SHOULD BE DISMISSED BECAUSE IT VIOLATES DEFENDANT'S FUNDAMENTAL RIGHTS TO DUE PROCESS UNDER THE FIFTH AMENDMENT

A fourth trial would violate Defendant's Due Process rights and therefore, the indictment against Defendant should be dismissed. The Fifth Amendment reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprivea of life, liberty, or property, without due process of law*, nor shall private property be taken for public use, without just compensation."
>
> U.S. Const., Amend. V (emphasis added).